

NOT FOR PUBLICATION

MAY 20 2015

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U.S. BKCY. APP. PANEL
OF THE NINTH CIRCUIT

UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

In re:)	BAP No. EC-14-1074-JuKuPa
)	
STEVEN JAMES SAVAGE and)	Bk. No. 12-28943
ANGELA KATHLEEN SAVAGE,)	
)	Adv. No. 12-02513
Debtors.)	
)	
STEVEN JAMES SAVAGE,)	
)	
Appellant,)	
)	
v.)	M E M O R A N D U M *
)	
LEONARD BRILL; VICKI BRILL,)	
)	
Appellees.)	
)	

Argued and Submitted on May 14, 2015
at Sacramento, California

Filed - May 20, 2015

Appeal from the United States Bankruptcy Court
for the Eastern District of California

Honorable Christopher M. Klein, Chief Bankruptcy Judge,
Presiding

Appearances: Jeffrey H. Ochrach of Ochrach Law Group argued
for appellant Steven James Savage; Kathryn Shubik
Diemer of Diemer, Whitman & Cardosi, LLP argued
for appellees Leonard and Vicki Brill.

Before: JURY, KURTZ, and PAPPAS, Bankruptcy Judges.

* This disposition is not appropriate for publication.
Although it may be cited for whatever persuasive value it may
have (see Fed. R. App. P. 32.1), it has no precedential value.
See 9th Cir. BAP Rule 8024-1.

1 Appellee Leonard Brill (Brill) filed an adversary
2 proceeding against chapter 7¹ debtor, Steven James Savage,
3 seeking a determination that his claim against debtor was
4 nondischargeable under § 523(a)(2) and (6) and requesting denial
5 or revocation of debtor's discharge under § 727(a)(2) and (4).²
6 After a trial, the bankruptcy court entered judgment in debtor's
7 favor on all claims for relief. Debtor then filed a motion
8 seeking \$65,476.90 in attorneys' fees and costs (Fee Motion),
9 which the bankruptcy court denied. This appeal followed. We
10 AFFIRM.

11 I. FACTS³

12 In June 2009, California Designer Cabinets, Inc. dba Savage
13 Designer Cabinets (CDC) and Brill entered into a sales agreement
14 whereby CDC would manufacture custom cabinets for Brill's house.
15 A dispute arose between Brill and CDC regarding the timing of
16 constructing the cabinets. As a result, Brill cancelled the
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18 ¹ Unless otherwise indicated, all chapter and section
19 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532.
20 "Rule" references are to the Federal Rules of Bankruptcy
21 Procedure and "Civil Rule" references are to the Federal Rules of
22 Civil Procedure.

23 ² Although Vicki Brill was added as a plaintiff to the
24 complaint in August 2013, for purposes of simplicity and because
25 it makes no difference to the result, this memorandum will speak
26 as if Brill were the sole plaintiff in the adversary proceeding.
27 For the same reason, we refer to debtor as though he was the sole
28 debtor.

29 ³ We take judicial notice of various pleadings which were
30 docketed and imaged by the bankruptcy court in this adversary
31 proceeding and the underlying bankruptcy case. Atwood v. Chase
32 Manhattan Mortg. Co. (In re Atwood), 293 B.R. 227, 233 n.9 (9th
33 Cir. BAP 2003).

1 contract and demanded a refund. When he did not receive one,
2 Brill sued CDC and Developers Surety and Indemnity Company in
3 the California state court, asserting causes of action for,
4 among others, rescission of the contract or, alternatively, for
5 breach of contract. Debtor was not a named defendant in the
6 case.⁴ Around the same time, CDC stopped all operations and
7 went out of business. In February 2012, Brill obtained a
8 default judgment against CDC in the amount of \$134,775.08, which
9 included his costs and attorneys' fees.

10 A few months later, debtor and his wife filed a joint
11 chapter 7 petition.

12 In August 2012, Brill filed an adversary complaint against
13 debtor seeking a determination that his claim against debtor was
14 nondischargeable under § 523(a)(2) and (6) and requesting denial
15 or revocation of debtor's discharge under § 727(a)(2) and (4).
16 As to his § 523(a)(2) and (6) claims for relief, Brill alleged
17 that debtor committed fraud by representing that he was properly
18 licensed and able to perform the work he had contracted to do
19 under the sales agreement. Brill further alleged that debtor
20 failed to supply the cabinets and install them in a timely
21 manner and in compliance with California law. Finally, Brill
22 asserted that debtor's willful and malicious refusal to honor
23 his contract with Brill caused Brill to suffer significant
24 damages. In his prayer for relief on these claims, Brill

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26 ⁴ It appears that Brill first filed a state court lawsuit
27 naming CDC and debtor as defendants. Defendants filed a motion
28 to change venue which the state court granted. Brill then
dismissed that lawsuit and filed an entirely new case against CDC
only and removed any claims against debtor personally.

1 requested actual damages "arising from the torts" described,
2 punitive damages, and costs. As to his § 727(a)(2) and (4)
3 claims for relief, Brill alleged that debtor failed to properly
4 describe his assets in his bankruptcy petition, failed to
5 disclose commission income, and made numerous preferential
6 transfers to insiders including his father and son prior to
7 filing the bankruptcy. In his prayer for relief on these
8 claims, Brill requested revocation of debtor's discharge and
9 also requested actual damages "arising from the torts" set forth
10 above, punitive damages, and costs.

11 Debtor filed a motion to dismiss the complaint on the
12 ground that Brill was not a creditor holding a claim in his
13 estate because (1) Brill had entered into the underlying
14 contract with CDC and (2) Brill had obtained a state court
15 default judgment against CDC. Judge Klein denied the motion
16 without elaboration.

17 Debtor then answered the complaint with general denials and
18 asserted numerous affirmative defenses including, among others,
19 that Brill was not a creditor and had no standing to assert any
20 claims in debtor's bankruptcy proceeding.

21 The matter was set for trial on November 22, 2013, before
22 the Honorable David E. Russell. In his trial brief, Brill
23 argued for denial or revocation of debtor's discharge under
24 § 727(a)(2) and (4). In a footnote, Brill stated that he did
25 not intend to pursue the § 523(a) claims at trial. Therefore,
26 no arguments related to those claims. In a three-page trial
27 brief, debtor asserted that Brill's purported dismissal of the
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1 § 523(a) claims was ineffective.⁵

2 At trial, debtor's counsel argued again that Brill was not
3 a creditor in debtor's estate because Brill had entered into the
4 contract with CDC. According to debtor's counsel, if Brill was
5 not a creditor, then he did not have the right to assert a § 727
6 claim. Counsel further asserted that Brill had obtained a
7 default judgment against CDC for the underlying debt and was now
8 asserting the same claims against him.

9 Brill's counsel argued that debtor had made a "judicial
10 admission" in his schedules that Brill was a creditor. Counsel
11 also requested that she be allowed to amend the complaint to
12 include alter ego allegations if the complaint did not already
13 include them - which it did not. Judge Russell was not
14 persuaded by her judicial admission argument and declined to
15 allow any further amendments to the complaint.

16 Judge Russell proceeded with the trial and heard testimony
17 from debtor. Brill's counsel questioned debtor about various
18 omissions from his schedules and the transfer of certain assets.
19 There was no evidence presented on the § 523 claims during
20 trial. At the close of Brill's case on the § 727 claims for
21 relief, debtor's counsel moved for judgment in debtor's favor
22 under Civil Rule 52,⁶ on the grounds that Brill was not a
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24 ⁵ Cal. Civil Code § 1717(b)(2) provides: "Where an action
25 has been voluntarily dismissed . . ., there shall be no
26 prevailing party for purposes of this section." Debtor implied
27 that Brill may have attempted to dismiss the § 523 claims to
avoid the payment of any attorneys' fees.

28 ⁶ Civil Rule 52 is made applicable to bankruptcy proceedings
by Rule 7052.

1 creditor with standing to assert the claims and there was no
2 evidence to support the claims.

3 Apparently ruling on the motion, Judge Russell placed his
4 findings of fact and conclusions of law on the record. First,
5 he concluded that Brill was not a creditor. Next, Judge Russell
6 ruled on the § 727 claims and found that, although debtor had
7 omitted an asset from his schedules, it was a mistake. He also
8 found debtor's testimony was straightforward and non-evasive.
9 Judge Russell concluded that debtor was honest and thus there
10 was no basis to deny his discharge. Finally, Judge Russell
11 noted that the adversary complaint included a § 523(a)(2) claim
12 for relief, but no evidence was presented on that claim.
13 Therefore, he decided to enter judgment in favor of debtor on
14 the §§ 523(a)(2) claim⁷ and 727(a) claim. On November 28, 2013,
15 the bankruptcy court entered a Civil Minute Order granting
16 judgment in debtor's favor.

17 Once the judgment became final, debtor filed the Fee Motion
18 seeking \$65,476.90 in attorneys' fees and costs. Relying on the
19 underlying contract between Brill and CDC and Cal. Civ. Code
20 (CC) § 1717(a), debtor argued that he was entitled to recover
21 attorneys' fees since Brill's claims were based "on the
22 contract." Debtor maintained that Brill's responses to
23 discovery showed that the claims he alleged in the adversary
24 complaint arose out of the CDC contract. When asked what acts
25 debtor committed that formed the basis for the claims alleged in
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27 ⁷ The bankruptcy court did not specifically refer to the
28 § 523(a)(6) claim.

1 the adversary complaint, Brill stated: "Defendant failed to
2 commence and continue, and suspended and abandoned work on the
3 Brill Home in violation of the Sales Agreement and California
4 law. Defendant willfully and maliciously refused to honor his
5 contract with Plaintiff." Finally, debtor argued that the
6 underlying litigation need not necessarily be for breach of
7 contract. Citing Marsu, V.V. v. Walt Disney Co., 185 F.3d 932,
8 939 (9th Cir. 1999), debtor asserted that even an action
9 "sounding in tort" may trigger the right to a contractual
10 attorney fees recovery if the fee provision is broadly worded.

11 Brill opposed the Fee Motion, contending that the claims
12 for relief in the adversary complaint were based on the
13 nondischargeability provisions and not on breach of contract.

14 On February 4, 2014, Judge Klein heard the parties'
15 arguments on the Fee Motion. At the continued February 18, 2014
16 hearing on the matter, Judge Klein placed his findings of fact
17 and conclusions of law on the record. Citing Redwood Theaters,
18 Inc. v. Davison (In re Davison), 289 B.R. 716 (9th Cir. BAP
19 2003) and Santisas v. Goodin, 951 P.2d 399 (Cal. 1998), the
20 bankruptcy court found that the adversary proceeding was
21 fundamentally a tort action and not covered by CC § 1717. The
22 bankruptcy court denied the Fee Motion by entering a Civil
23 Minute Order on February 18, 2014. Debtor timely appealed.

24 **II. JURISDICTION**

25 The bankruptcy court had jurisdiction pursuant to 28 U.S.C.
26 §§ 1334 and 157(b)(1). We have jurisdiction under 28 U.S.C.
27 § 158.

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IV. STANDARDS OF REVIEW

Whether attorney's fees may be awarded to the prevailing party in an action to deny discharge is a question of law that we review de novo. Tuloil, Inc. v. Shahid (In re Shahid), 254 B.R. 40, 44-45 (10th Cir. BAP 2000).

V. DISCUSSION

It is well settled that the Bankruptcy Code does not include a general right to attorneys' fees. Heritage Ford v. Baroff (In re Baroff), 105 F.3d 439, 441 (9th Cir. 1997); In re Dinan, 448 B.R. at 784. The "American Rule" is that attorney fees generally are not recoverable by a prevailing

1 party unless specifically allowed by contract or statute.
2 Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240,
3 257-58 (1975); In re Baroff, 105 F.3d at 441. In a
4 nondischargeability action, attorney fees can be included if the
5 fees are recoverable under a state statute. Bertola v. N. Wis.
6 Prod. Co. (In re Bertola), 317 B.R. 95, 99-100 (9th Cir. BAP
7 2004). In claiming an entitlement to attorneys' fees in this
8 litigation, debtor relies on the attorney fee provision in the
9 contract between CDC and Brill, CC § 1717, and Cal. Code Civ. P.
10 (CCP) § 1021.⁸ We apply California law to determine whether
11 debtor was entitled to his attorneys' fees.

12 The contractual attorney fee provision provides in relevant
13 part:

14 In the event of any form of breach of contract or
15 threatened breach of this agreement resulting in legal
16 expenses, whether incident to litigation or not, the
17 buyer shall be responsible for all reasonable
18 attorneys fees and expenses incurred. . . .

19 CC § 1717 states in relevant part:

20 (a) In any action on a contract, where the contract
21 specifically provides that attorney's fees and costs,
22 which are incurred to enforce that contract, shall be
23 awarded either to one of the parties or to the
24 prevailing party, then the party who is determined to
25 be the party prevailing on the contract, whether he or
26 she is the party specified in the contract or not,
27 shall be entitled to reasonable attorney's fees in
28 addition to other costs.

29

30 CCP § 1021 provides in relevant part:

31 Except as attorney's fees are specifically provided
32 for by statute, the measure and mode of compensation

33 ⁸ Debtor never cited CCP § 1021 as a basis for his
34 attorneys' fees in the bankruptcy court.

1 of attorneys and counselors at law is left to the
2 agreement, express or implied, of the parties

3 **A. CC § 1717 Does Not Apply To This Case Because Brill Would**
4 **Not Have Been Entitled To Attorneys' Fees In This**
5 **Adversary.**

6 CC § 1717 allows a party or nonparty to recover attorneys'
7 fees incurred in the litigation of a contract claim. See
8 Hosseini v. Key Bank (In re Hosseini), 504 B.R. 558, 567-68 (9th
9 Cir. BAP 2014); In re Davison, 289 B.R. at 726 (citing Santisas,
10 17 Cal.4th 599, 615 (1998)). The legislature's goal in enacting
11 this section was to ensure the mutuality of an attorneys' fees
12 remedy in contractual attorney fees provisions. Santisas,
13 17 Cal.4th at 610; Hsu v. Abbara, 9 Cal.4th 863, 870-71 (Cal.
14 1995). There are two aspects to this mutuality: (1) an
15 attorneys' fee provision entitling only one party to fees must
16 be interpreted to allow fees to whichever party prevails; and
17 (2) a nonsignatory sued under the contract may recover
18 attorneys' fees just as a signatory would, under certain
19 circumstances. Santisas, 17 Cal.4th at 610-611. Debtor's focus
20 in this appeal is on the second mutuality requirement since he
21 was not a signatory to the contract.

22 Undoubtedly if Brill had tried to hold debtor liable for
23 CDC's debt under an alter ego theory in the state court
24 litigation, debtor could have made a claim for attorneys' fees
25 if he had prevailed. The California Supreme Court decided the
26 question in Reynolds Metals Co. v. Alperson, 25 Cal.3d 124 (Cal.
27 1979), a collection case in which a creditor sued two individual
28 shareholders of a bankrupt corporation as its alter egos. The
shareholders prevailed, and the court found they were entitled

1 to fees under attorney fee provisions in the notes. "Had
2 plaintiff prevailed on its cause of action claiming defendants
3 were in fact the alter egos of the corporation . . . ,
4 defendants would have been liable on the notes. Since they
5 would have been liable for attorney's fees pursuant to the fee
6 provision had plaintiff prevailed, they may recover attorney's
7 fees pursuant to [CC] section 1717 now that they have
8 prevailed." Id. at 129. However the question before us is
9 different. Brill did not sue debtor in the state court under an
10 alter ego theory and did not assert an alter ego claim against
11 debtor in this adversary. Indeed, the bankruptcy court denied a
12 request by Brill's counsel for amendment of the complaint to
13 include such a claim. Moreover, assertion of an alter ego claim
14 provides a contractual remedy against a non-party to a contract.
15 This was not an action for breach of contract but about a
16 debtor's right to a discharge. Therefore, Reynolds has no
17 application to these facts.

18 Putting Reynolds aside, debtor's entitlement to recover
19 fees under the contract would exist purely by virtue of the
20 mutuality provisions under CC § 1717; that is, he would be
21 entitled to recover fees against Brill only because Brill would
22 have been entitled to recover fees against him had Brill
23 succeeded in the adversary proceeding. Under California's
24 merger doctrine, the entry of the judgment extinguished all
25 contractual rights Brill had under the terms of the contract
26 between CDC and Brill, including the right to attorneys' fees.
27 Hambrose Reserve, Ltd. v. Faitz, 9 Cal.App.4th 129 (Cal. Ct.
28 App. 1992) ("Once there is a judgment, contractual rights are

1 merged into and extinguished by the terms of the judgment. At
2 that point there is no subsisting contractual attorney fee
3 provision on which [CC] section 1717 may operate."); Chelios v.
4 Kaye, 219 Cal.App.3d 75, 80 (Cal. Ct. App. 1990) ("When . . . a
5 lawsuit on a contractual claim has been reduced to a final,
6 nonappealable judgment, all of the prior contractual rights are
7 merged into and extinguished by the monetary judgment, and
8 thereafter the prevailing party has **only** those rights as set
9 forth in the judgment itself." (Emphasis added). Accordingly,
10 because the contract was extinguished, Brill could not have
11 invoked the contractual fee clause to recover his fees in this
12 adversary proceeding under either the § 523 or the § 727 claims.

13 For all these reasons, the mutuality provisions under
14 CC § 1717 do not extend to debtor.

15 **B. The Litigation Was Not An Action "On The Contract" As**
16 **Required Under CC § 1717(a).**

17 We agree with Judge Klein that Brill's § 523 claims for
18 relief were tort-based claims not covered by CC § 1717. The
19 title of the cause of action is of secondary importance to the
20 nature of the parties' assertions in applying CC § 1717(a).
21 In re Baroff, 105 F.3d at 443. Also, "[i]n determining whether
22 an action is 'on the contract' under [CC §] 1717, the proper
23 focus is not on the nature of the remedy, but on the basis of
24 the cause of action." In re Tobacco Cases I, 193 Cal.App.4th
25 1591, 1602 (Cal. Ct. App. 2011). Applying these principles,
26 Brill's factual allegations against debtor under the § 523(a)(2)
27 and (6) claims for relief were based on debtor's own fraud and
28 conduct and did not implicate contract principles. Thus, the

1 bankruptcy court committed no error by applying the holdings of
2 Davison and Santisas to this case – the creditor’s action must
3 have been brought to enforce its rights under the agreement.
4 Santisas, 951 P.2d at 409 (tort claims are “outside the ambit of
5 section 1717”); Davison, 289 B.R. at 724 (attorneys’ fees for
6 tort claims are not recoverable under CC § 1717); see also
7 In re Baroff, 105 F.3d at 443 (“Under California law, a tort
8 action for fraud arising out of a contract is not an action on a
9 contract within the meaning of [CC] § 1717.”).

10 In addition, debtor’s argument that Brill’s adversary
11 complaint was an action based “on the contract” centers on the
12 threshold issue of Brill’s creditor status and standing to bring
13 the §§ 523 and 727 claims. However, Brill’s creditor status and
14 legal standing in the adversary proceeding was a pure question
15 of law, the answer to which did not depend upon contract
16 principles. Generally, California law treats a corporation as
17 an entity separate and distinct from its shareholders, officers
18 and directors. Communist Party v. 522 Valencia, Inc.,
19 35 Cal.App.4th 980, 993 (Cal. Ct. App. 1995). Under ordinary
20 circumstances, shareholders do not incur personal liability for
21 the corporation’s actions during its existence. They are not
22 personally liable for the corporation’s debts or its torts.
23 Bing Crosby Minute Maid Corp. v. Eaton, 46 Cal.2d 484, 487 (Cal.
24 1956). In applying this law, Judge Russell was not called upon
25 to make any determination regarding the parties’ contract other
26 than noting that the underlying contract was between Brill and
27 CDC. Under the authorities cited above, it followed that Brill
28 was not a creditor with a claim in debtor’s estate.

1 Finally, the trial conducted before Judge Russell was only
2 on Brill's § 727 claims for relief since Brill had abandoned his
3 § 523 claims prior to trial. In refusing to deny debtor's
4 discharge under § 727, Judge Russell did not rely on the
5 contract or even discuss it. Instead, the court heard debtor's
6 testimony, found him honest, and concluded there was no basis to
7 deny debtor his discharge. Notably, debtor has cited no case
8 law which holds that § 727 claims are actions "on a contract"
9 when such claims are successfully defended. See Tuloil, Inc. v.
10 Shahid (In re Shahid), 254 B.R. 40, 44-45 (10th Cir. BAP 2000)
11 (concluding § 727 does not provide a statutory basis for an
12 award of attorneys' fees, and that the attorney fee clause in
13 creditor's contract with debtor was inapplicable because an
14 action under § 727 was not an action on the contract). The
15 Panel was also unable to find any Ninth Circuit case where a
16 prevailing creditor in a § 727 action was awarded attorneys'
17 fees on any provision.

18 For all these reasons, debtor's reliance on Win v. Tran
19 (In re Tran), 301 B.R. 576, 583 (Bankr. S.D. Cal. 2003) misses
20 the mark. In Tran, the bankruptcy court noted that the trial
21 had proceeded as a breach of contract claim. The record does
22 not support such a finding under the facts of this case.

23 **C. Debtor's CCP § 1021 Argument Has Been Waived.**

24 Debtor also argues that Judge Klein erred by not
25 considering whether the attorney fee provision in the contract
26 was broadly worded to cover actions sounding in tort as well as
27 contract. "We apply a general rule against entertaining
28 arguments on appeal that were not presented or developed before

1 the [bankruptcy] court." Davis v. Elect. Arts Inc., 775 F.3d
2 1172, 1180 (9th Cir. 2015). Debtor's Fee Motion did not mention
3 CCP § 1021 and debtor's counsel never argued before Judge Klein
4 that CCP § 1021 was applicable to the attorney fee provision in
5 the contract. Accordingly, debtor's argument about the
6 applicability of CCP § 1021 to the attorney fee provision is
7 deemed waived.

8 We have recognized three circumstances in which we have
9 discretion to reach waived issues, including "'when the issue
10 presented is purely one of law and either does not depend on the
11 factual record developed below, or the pertinent record has been
12 fully developed.'" Id. Under the circumstances of this case,
13 whether the attorney fee provision is broad enough to cover
14 fraud and other torts is a question of law that we can address
15 on the existing record. See United States v. 1.377 Acres of
16 Land, 352 F.3d 1259, 1264 (9th Cir. 2003) (the interpretation of
17 language in a contract is a question of law reviewed de novo).
18 We therefore exercise our discretion to address the issue.

19 Although debtor suggests we interpret the attorney fee
20 provision broadly to cover all disputes arising out of the
21 contract, we decline to do so. On its face, the express
22 language of the attorney fee provision limits recovery of
23 attorneys' fees to actions relating to breach of the contract.
24 The narrow language employed cannot be construed to cover all
25 actions "resulting from" the agreement as debtor argues. Also,
26 neither the § 523 claims nor the § 727 claims were "disputes
27 arising from the contract" between Brill and CDC.
28 Accordingly, CCP § 1021 is of no help to debtor under these

1 circumstances.

2 **VI. CONCLUSION**

3 Having found no error, we AFFIRM.